Office-Supreme Court, U.S.
FILED
SEP 1 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 15

EVANDER FORD, *et al.*,

Petitioners,

—v.—

STATE OF TENNESSEE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

JACK GREENBERG
JAMES M. NABRIT, III
DERRICK A. BELL, JR.
Suite 1790
10 Columbus Circle
New York 19, New York

R. B. SUGARMON, JR.
B. L. HOOKS
H. T. LOCKHARD
A. W. WILLIS
B. F. JONES
I. H. MURPHY
Memphis, Tennessee

Attorneys for Petitioners

INDEX

	PAGE
Citation to Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	4
How the Federal Questions Were Raised and Decided	6
Reasons for Granting the Writ	9
I—The Judgment of the Court Below Conflicts With the Principles Established by This Court That It Is a Denial of Due Process to Convict Persons of Crimes Without Evidence of Their Guilt	9
II—The Conviction of Petitioners Denied Their Rights of Freedom From State Enforced Racial Segregation Protected by the Fourteenth Amendment to the Constitution of the United States	12
III—If This Court Should Determine That the Court Below Improperly Decided the Constitutional Issues, Justice Requires That an Order Be Entered Vacating the Judgment Against Petitioner Katie Jean Robertson	13
Conclusion	15

TABLE OF CASES

	PAGE
Barrows v. Jackson, 346 U. S. 249	13
Brown v. Board of Education, 347 U. S. 294	12
Burton v. Wilmington Parking Authority, 365 U. S. 715	12
Garner v. Louisville, 368 U. S. 157	9, 11
Gayle v. Browder, 352 U. S. 903	12
Holmes v. Atlanta, 350 U. S. 879	12
Muir v. Louisville Park Theatrical Association, 202 F. 2d 275 (6th Cir. 1953), judgment vacated and remanded 347 U. S. 971 (1954)	12
Patterson v. Alabama, 294 U. S. 600	2, 14
Shelley v. Kraemer, 334 U. S. 1	13
Taylor v. Louisiana, 7 L. ed. 2d 395	9, 11
Thompson v. City of Louisville, 362 U. S. 199	9, 11
Turner v. Memphis, 369 U. S. 350	12

STATUTES

Tennessee Code Annotated §39-1204	2
28 U. S. C. §1257(3)	1

IN THE

Supreme Court of the United States

October Term, 1962

No. .....

EVANDER FORD, *et al.*,

Petitioners,

—v.—

STATE OF TENNESSEE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above entitled case on March 7, 1962, rehearing of which was denied on May 4, 1962.

Citation to Opinions Below

The opinion of the Supreme Court of Tennessee is reported in 355 S. W. 2d 102 (1962), rehearing denied 356 S. W. 2d 726 (1962), and is set forth in the Appendix hereto, *infra*, pp. 17-23.

Jurisdiction

The judgment of the Supreme Court of Tennessee was entered March 7, 1962, *infra*, pp. 24-27. Petition for rehearing was denied by the Supreme Court of Tennessee on May 4, 1962, *infra*, p. 28.

The jurisdiction of this Court is invoked pursuant to Title 28, U. S. C. 1257(3), petitioners having asserted below

and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

Whether petitioners were denied their rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States:

1. When convictions of willfully disturbing a religious assembly were based on a record containing no evidence of their guilt.

2. When convicted of disturbing a religious assembly for merely peacefully taking seats on a non-segregated basis at a church youth rally held at a city-owned auditorium opened to the public.

3. Whether, if this Court should determine that the court below improperly decided the federal constitutional questions stated above, the doctrine of *Patterson* v. *Alabama*, 294 U. S. 600, requires that an order be entered vacating the judgment against petitioner Katie Jean Robertson.

Constitutional and Statutory Provisions Involved

1. The Fourteenth Amendment to the Constitution of the United States.

2. The Tennessee statutory provision involved is §39-1204, Tennessee Code Annotated, which provides:

> If any person willfully disturb or disquiet any assemblage of persons met for religious worship, or for educational or literary purposes, or as a lodge or for the purpose of engaging in or promoting the cause of temperance, by noise, profane discourse, rude or

indecent behavior, or any other act, at or near the place of meeting, he shall be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200), and may also be imprisoned not exceeding six (6) months in the county jail.

Statement

On August 30, 1960 (R. 71), the Assembly of God Church in Memphis, Tennessee (R. 69) held a city-wide Youth Rally at Overton Park Shell (R. 70) an open air auditorium located in a publicly owned park (R. 125). The church group had leased the auditorium from the City of Memphis (R. 71, 122) and had published advertisements of the services which were to consist of singing, devotions and a special film (R. 78-79). Negroes were not excluded from the public invitation because, according to a church official, there are no Negro members in the Assembly of God Church and none were expected to attend (R. 78, 82, 276). The services began at 7:30 P.M. with from 400 to 700 people present (R. 72).

About 15 minutes after the service began (R. 73), and while the group was singing hymns (R. 75), a group of 13 or 14 Negroes including the petitioners (R. 76) entered and was greeted by the head usher for the group who testified: "I asked them out of courtesy if he would not remain, since this was a segregated meeting, featuring the young people of the Assembly of God" (R. 91). When the Negroes failed to leave, the usher noting that there were some 20 rows vacant behind the audience (R. 92), "got a plan" (R. 92), and suggested that they sit at the rear of the building since the services were already in progress (R. 285, 293). At this request, petitioner Ford replied, "No, we are certainly not going to do that, . . ."

(R. 308), and according to the usher directed the group to "scatter out" (R. 91).

The Negroes proceeded down into the audience, and seated themselves in couples among the gathering (R. 92). They were quiet, properly dressed (R. 80), and made no noise while taking seats (R. 277, 293). Nevertheless, according to State witnesses, as the Negroes moved in, white people began to move, and some left (R. 93, 288) because a church official reported "they were not accustomed to attending services with Negroes" (R. 79-80). This moving and shifting created some disturbance (R. 276-296).

At this point, the minister in charge of the group, Rev. Scruggs, testified that the service continued, but that he called the police and also sent word to assistants that the film which was scheduled to start should be held up until the disturbance could be quieted (R. 268). Nevertheless, when the police arrived about five or ten minutes later (R. 268, 297), most of the white people had settled down (R. 298); an offering may have been received (R. 83), the lights had been lowered (R. 298), and the movie was in progress (R. 114, 310).

When the police arrived, the lights were turned on again and the movie was stopped so that the police could find the petitioners (R. 298). The police were instructed to locate colored people in the Shell, inform them they were under arrest and bring them outside (R. 109, 329). Police officers testified that fourteen Negroes, male and female were arrested (R. 109). All were seated quietly when the police arrived, were properly dressed, used no loud or profane language, engaged in no boisterous or indecent conduct, and offered no resistance to arrest (R. 112, 326).

Rev. Scruggs contended that he arrested petitioners not because they were Negroes, but because they created a

disturbance when they refused to take seats in the rear and "decided to slide in and take seats and intermingle with the crowd" (R. 86, 296). He admitted that "the thing that caused the disturbance was that they intermingled" (R. 86), and surmised that the disturbance grew out of the fact that the white people were not accustomed to attending services with Negroes (R. 79-80).

> "Q. And this disturbed the gathering, in this sense of the word because they were Negroes? A. I suppose that's true; yes" (R. 80).

Additional indications that it was petitioners' color and not their actions that created the disturbance is seen in the testimony of the head usher who indicated that all white latecomers (10 to 20 persons) had taken seats among the audience without incident (R. 291)

> "Q. Did any of them enter into a row of seats where anybody else was sitting, where they would have to pass over anyone? A. Most of them, we directed them how to be seated behind others or to where there were seats vacant on the aisle.
>
> Q. Did any of the persons who came in after the services began go into a row of seats where it was necessary for them to pass by another person who was seated? A. I imagine so. That has been a year and a half. I am sure that there were some that did that. I did not pay exactly that close attention as to where they were sitting. I am sure that there was some who did that.
>
> Q. Now, did they create any disturbance? A. No, sir.
>
> Q. It did not. In fact, you hardly noticed it, is that correct? A. That's right" (R. 291-292).

Following their arrest, the petitioners were tried and convicted of violating Section 39-1204, Tennessee Code Annotated.

The petitioners, with the exception of Katie Jean Robertson, were tried on June 19th and 20th, 1961, and were sentenced to serve 60 days in the Shelby County Penal Farm and fined $200. Petitioner Katie Jean Robertson was tried on September 25, 1961 and was sentenced to serve 60 days and fined $175.00.

The Supreme Court of Tennessee affirmed the convictions finding that the actions of the defendants created a disturbance in the religious service and therefore violated the statute. Moreover, they found that such actions were willful and designed to created an incident. The Court stated that the issue of whether Negroes could be segregated at the service held in a public facility was not present in this case and the convictions did not violate any constitutional rights guaranteed by the Fourteenth Amendment to the petitioners.

How the Federal Questions Were Raised and Decided

The petitioners were tried before the criminal court of Shelby County, Tennessee in two separate trials on June 19th and 20th, 1961 and September 25, 1961 (R. 258).

At the conclusion of the testimony in the trial of June 19th, petitioners Evander Ford, Jr., Alford O. Gross, James Harrison Smith, Ernestine Hill, Johnnie May Rogers, Charles Edward Patterson and Edgar Lee James, made a motion to dismiss the charges, maintaining therein that the arrests followed petitioners' peaceful efforts to attend a public meeting in a publicly owned facility leased to a private group who sought to operate it on a racially segregated basis, and therefore such arrest deprived petitioners

of their rights under the due process and equal protection clauses of the Fourteenth Amendment (R. 131-136). This motion was denied (R. 137).

Petitioners were convicted and filed a motion for new trial on August 7, 1961 (R. 229), relying *inter alia* on a denial of their rights under the Fourteenth Amendment to be admitted on a nonsegregated basis to publicly owned facilities leased by private lessees for functions to which the public is invited. The motion was denied on August 15, 1961 (R. 231).

In the second trial, in which judgment of conviction was returned on September 25, 1961, against petitioner Katie Jean Robertson (R. 251), a motion for new trial raising federal issues similar to those contained in the motion filed in the first trial, was overruled on November 3, 1961 (R. 254).

The Supreme Court of Tennessee consolidated the appeal of Evander Ford, Jr., *et al.*, with that of Katie Jean Robertson (R. 359). In their Assignment of Error filed with the Supreme Court of Tennessee on January 15, 1962 (R. 360), petitioners contended:

1. "Plaintiffs in Error contention is that the record contains no evidence to support a finding that the defendants disturbed a religious assembly in violation of Section 39-1204 of the Tennessee Code Annotated, and that a conviction of such violation violates the defendants' rights to due process of the law guaranteed to them by the Fourteenth Amendment of the Constitution of the United States. (Thompson v. City of Louisville, 362 U. S. 99; Garner v. Louisiana, 26, 27, 28 Oct. Term 1961, Supreme Court, U. S. A.)" (R. 366).

2. "The Jury and the Court failed to consider the fact that the defendants were members of the public, peacefully assembled and worshiping God at public meeting held at a publicly owned facility namely the Shell in Overton Park, and that they were peacefully worshiping and using said public facility in the same manner as white persons similarly situated; and that they were arrested, indicted and convicted solely because of the color of their skin" (R. 366).

The Supreme Court of Tennessee ruled that the appeal of Katie Jean Robertson must be affirmed for failure to timely file the Bill of Exceptions and that no reversible error was found in the technical record before the Court (R. 393-2).

As to the appeals of Evander Ford, Jr., *et al.*, the Supreme Court of Tennessee construed, petitioners' acts as violative of Section 39-1204, Tennessee Code Annotated, in that they refused to be seated where requested and dispersed themselves throughout the Audience, which actions the court below concluded were planned and "completely interrupted the service."

The court below then summarized petitioners' constitutional objections as follows:

> The Defendants next argue that their constitutional rights are being violated by this conviction because this is a publicly owned facility and they could not be excluded. First, it must be noted that the Defendants were tendered seats at this meeting even though they had been denied admission at the outset. Second, this is not a suit to enjoin a discriminatory practice, nor is it a damage suit based upon the violation of civil rights, but rather a criminal action charging the Defendants with willfully disturbing a religious as-

sembly. Whether these Defendants had a right to be at the place where this religious meeting was being conducted is not an issue in this lawsuit. The sole issue here is whether or not these Defendants willfully disturbed the meeting that was being held there and we have hereinbefore determined this question adversely to the Defendants' contention.

Reasons for Granting the Writ

I

The Judgment of the Court Below Conflicts With the Principles Established by This Court That It Is a Denial of Due Process to Convict Persons of Crimes Without Evidence of Their Guilt.

The principle that the due process clause of the Fourteenth Amendment to the Constitution of the United States forbids criminal convictions based upon no evidence of guilt was set forth by this Court in *Thompson* v. *City of Louisville*, 362 U. S. 199, and has been applied and reaffirmed in *Garner* v. *Louisiana*, 368 U. S. 157, and *Taylor* v. *Louisiana*, 7 L. ed. 2d 395. This record presents another occasion for the application of this principle.

The petitioners were convicted under a State statute prohibiting willful disturbance of a religious assembly "by noise, profane discourse, rude or indecent behavior, or *any other act*." There was no claim or evidence that petitioners engaged in any noise, profane discourse or rude or indecent behavior. The indictment charging them alleged that they disturbed and disquieted an assemblage of persons met for religious worship in that "after being refused admittance to the services therein, did force their way into the said assemblage, seat themselves among the worshipers

and by this act did cause the disruption of said religious assemblage." However, the record shows that petitioners entered the open air auditorium owned by the City of Memphis and leased to a religious group and merely peacefully took seats therein during the services. When they first entered an usher told them that the meeting was racially segregated and asked them to leave but, subsequently offered them seats at the rear of the auditorium some twenty rows behind the audience. Petitioners declined this offer and proceeded down into the auditorium where they quietly seated themselves among the audience. In this regard, there is no evidence that petitioners conducted themselves any differently from ten to twenty white persons who, according to testimony of the ushers, also entered after the services had started. The evidence is clear that if there was any disturbance of the meeting it was caused by white persons in the audience who began to change their seats after the Negroes entered because "they were not accustomed to attending services with Negroes" (R. 78-80).

The services which were in progress continued and were not halted until the police, having been summoned by the minister in charge of the meeting, arrived at the auditorium and halted the proceedings in order to locate and arrest all Negro persons in the audience. The police reported that the Negroes were properly dressed, used no rude or profane language, were engaging in no boisterous or indecent conduct and offered no resistance to arrest.

It is apparent that the disturbance of the service resulted, as the minister in charge indicated, from the fact that the petitioners "intermingled" with whites instead of segregating themselves to the rear of the gathering as directed. Thus, it is also apparent that the arrest of the petitioners was based upon their color and the fact that they failed to racially segregate themselves when taking seats in the audi-

ence. As this Court held in *Garner* v. *Louisiana*, *supra*, the mere refusal to obey a segregation custom cannot by itself be made the equivalent of a breach of the peace. It should be noted that petitioners had a plain legal right to be present in the auditorium and not to be racially segregated therein because the premises were owned and operated by the City of Memphis for the use of the public, as is argued below in Part II of this Petition.

There is no evidence to support the conclusion reached by the court below that petitioners attended the services for the purpose of intentionally causing a disturbance. Indeed, there is every indication that any Negro attempting to attend the services on a nonsegregated basis, regardless of his intentions, would have caused a similar upset among those white persons present who were not accustomed to worshipping with Negroes. Clearly, it was the petitioners' color and not either their actions or intentions that led to the disturbance and their arrests. The court below denies that race was a factor in the arrests. There remains then no basis on which to sustain the convictions, and the due process clause of the Fourteenth Amendment requires that they be reversed. *Thompson* v. *City of Louisville*, *supra*; *Garner* v. *Louisiana*, *supra* and *Taylor* v. *Louisiana*, *supra*.

II

The Conviction of Petitioners Denied Their Rights of Freedom from State Enforced Racial Segregation Protected by the Fourteenth Amendment to the Constitution of the United States.

Petitioners' convictions were obtained in violation of their Constitutional rights in that they resulted directly from efforts by petitioners to attend, on a nonsegregated basis, a religious youth rally held at a city-owned auditorium open to, and provided for, the use of the public. If the convictions were not based upon no evidence of guilt, as is argued above, the only possible conclusion available on the record is that the state court equated petitioners' breach of the segregation custom or policy with a disturbance of the assembly, and is merely enforcing racial segregation under another label. This the State cannot do under the numerous decisions of this Court. *Brown* v. *Board of Education*, 347 U. S. 294; *Gayle* v. *Browder*, 352 U. S. 903; *Holmes* v. *Atlanta*, 350 U. S. 879.

The leasing of this open air auditorium to a private group does not alter the conclusion that the State is forbidden to enforce segregation. This Court has repeatedly held that the enforcement of racial segregation in publicly owned facilities cannot legally be accomplished by leasing such facilities to private persons. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Turner* v. *City of Memphis*, 369 U. S. 350; *Muir* v. *Louisville Park Theatrical Association*, 202 F. 2d 275 (6th Cir. 1953), judgment vacated and remanded, 347 U. S. 971.

The State cannot enforce segregation in such facilities indirectly through the use of its criminal laws any more than it could do so directly by a segregation law or rule. The Constitution forbids the courts, as well as other arms

of the States, from enforcing racial discriminations. *Shelley v. Kraemer*, 334 U. S. 1; *Barrows v. Jackson*, 346 U. S. 249.

The Supreme Court of Tennessee stated in its opinion that the issue in the case was not whether petitioners had a right to be at the meeting, but rather whether they willfully disturbed the meeting. However, the record plainly indicates that the only claim that petitioners created a disturbance was based upon the fact that their mere presence as Negroes in a white assembly was in itself a disturbance. Thus the State has made the presence of Negroes in a white assembly a crime just as surely as if it had directly punished petitioners under a segregation law. It is submitted that the issues presented by this case deserve plenary consideration by this Court because the decision of the court below ignores the principle that States and other agents may not enforce racial segregation.

III

If This Court Should Determine That the Court Below Improperly Decided the Constitutional Issues, Justice Requires That an Order Be Entered Vacating the Judgment Against Petitioner Katie Jean Robertson.

The petitioner Katie Jean Robertson was indicted in the same indictment with the other petitioners based upon the same occurrences. The record reveals that her conduct was no different from that of the other petitioners. However, because she was unavailable for trial when the other petitioners were tried, her trial was separate. The same issues were raised and presented to the trial court in her case and her case was consolidated with that of the others on appeal. The cases were decided by the court below in one opinion and the record of both trials has been certified to this Court as one record. The court below ruled

that it could not consider the merits of the constitutional arguments urged for petitioner Katie Jean Robertson (which were identical to those urged by the other petitioners) on the ground that the Bill of Exceptions for her case was filed in the Supreme Court of Tennessee two days too late. The court thus determined that it must affirm the conviction of petitioner Robertson as noted. In the same opinion the court rejected all of the arguments urged on behalf of the other petitioners, which were the same arguments made on behalf of petitioner Robertson.

It is submitted that in accordance with the principles of *Patterson* v. *Alabama*, 294 U. S. 600, if this Court should determine that the court below improperly decided the federal constitutional questions presented, this Court should enter an order vacating the judgment as to petitioner Robertson in view of that supervening development. It is submitted that the ends of justice would then require that the Court vacate the judgment and remand it to the Supreme Court of Tennessee in order that that court might reconsider its disposition of the case of Katie Jean Robertson in light of the properly applicable constitutional principles. The rule stated in *Patterson* v. *Alabama*, 294 U. S. 600, 617, in circumstances very similar to this, was that:

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
DERRICK A. BELL, JR.
Suite 1790
10 Columbus Circle
New York 19, New York

R. B. SUGARMON, JR.
B. L. HOOKS
H. T. LOCKHARD
A. W. WILLIS
B. F. JONES
I. H. MURPHY
Memphis, Tennessee

Attorneys for Petitioners

APPENDIX

Opinion of Supreme Court of Tennessee

OPINION

The Defendants, Evander Ford, Jr., Alfred O'Neil Gross, James Harrington Smith, Ernestine Hill, Johnnie Mae Rogers, Charles Edward Patterson, and Edgar Lee James, were convicted upon the same trial for willfully disturbing an assemblage of persons meeting for religious purposes (Section 39-1204, Tennessee Code Annotated), and each was sentenced to serve sixty days in the Shelby County Penal Farm, plus a fine of $200.00.

The Defendant, Katie Jean Robertson, was tried separately, she not being available at the time of the first trial, and was convicted of the same offense and sentenced to serve sixty days and fined $175.00. Since these two cases grew out of the same set of facts and the Defendants were acting in concert with each other, the cases were joined for purposes of appeal.

In the case of the Defendant, Katie Jean Robertson, the conviction must be affirmed for failure to timely file the bill of exceptions. The Trial Court overruled the Defendant's motion for a new trial on November 3, 1961. On Friday, December 1, 1961, the Defendant moved the Court for additional time in which to file and prepare her bill of exceptions. This motion was granted by the Trial Judge and the time for filing was extended thirty days from the 3rd day of December, 1961. As a result of this extension the Defendant had until January 2, 1962 in which to prepare and file the bill of exceptions. However, the bill of exceptions was not filed until January 4, 1962, which is two days late. A bill of exceptions which is filed too late does not become a part of the record in a case and cannot be looked

to for any purpose. *O'Brien v. State*, 193 Tenn. 361. This leaves only the technical record before the Court and we are unable to detect any reversible error therein.

Having disposed of Katie Jean Robertson's case the Court will now proceed to discuss the appeal as to the remaining Defendants. At the outset it must be noted that all of the proof in the record is uncontroverted. These Defendants are negro youths and their criminal prosecution resulted from an incident which took place in the City of Memphis on the evening of August 30, 1960. It appears that the Assembly of God Church on this evening had leased the "Shell", a municipally owned amphitheater situated in Overton Park of that city, for the purpose of conducting a youth rally as a part of their church activities. This meeting had received a considerable amount of advertisement as to time and place it was to be conducted.

The meeting commenced at 7:30 o'clock, P.M. on this evening. At approximately 7:45 o'clock, P.M. the Defendants herein, and some other negro youths who are not on trial here, entered the amphitheater. An usher on duty at this entrance met these Defendants as they entered. The usher then informed the group that it would be better if they did not come in, that this was a meeting for the youth of the Assembly of God Church. When the Defendants would not leave the usher asked them to take the rear seats. At this time the Defendant, Evander Ford, Jr., who was the apparent leader of this group, turned and told his group to "scatter out". The Defendants then broke into groups of two and simultaneously disbursed themselves throughout the audience. Even though there were seats available at the ends of the rows, the Defendants for the most part proceeded to step over the people already seated and moved to the center of the rows. The people who were already seated began to move away and in some instances

left the meeting. As a result of this mass entrance a general milling around was caused and an undercurrent went up throughout the audience which caused a delay in the service that was in progress. The police were then summoned and the Defendants were placed under arrest for the offense indicated above.

The Defendants stand convicted of Section 39-1204, Tennessee Code Annotated, which reads as follows:

> "If any person willfully disturb or disquiet any assemblage of persons met for religious worship, or for educational or literary purposes, or as a lodge or for the purpose of engaging in or promoting the cause of temperance, by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of meeting, he shall be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200), and may also be imprisoned not exceeding six (6) months in the county jail."

The Defendants first argue that the statute only condemns acts which are noisy, rude, profane, indecent, or other similar acts and that their action was none of these, therefore, the State has failed to make out a case against them. The State on the other hand insists that the statute reaches any willful disturbance of a religious assembly regardless of how it is accomplished. This squarely presents us with the problem of the construction of this statute.

At the outset it must be noted that this statute is not a breach of the peace statute as such, but rather it is a statute which is designed to protect to the citizens of this State the right to worship their God according to the dictates of their conscience without interruption. As a general rule these statutes have been very liberally construed by the Court. *Hollingsworth* v. *State*, 37 Tenn. 518. However, in order to

determine the exact boundaries of this statute we feel that it is necessary to review its historical development.

The first statute upon this subject made any person who would disturb a religious assembly punishable as a rioter at common law. *Chapter 35 of the Acts of 1801.* Then by *Chapter 60 of the Acts of 1815*, the legislature enacted an additional statute to supplement Chapter 35 of the Acts of 1801. The part of *Chapter 60 of the Acts of 1815* which is pertinent to our discussion here reads as follows:

> "It shall be the duty of all justices of the peace, . . . that whenever any wicked or disorderly person or persons shall either by word or gesture or *in any other manner whatsoever* disturb any congregation which may have assembled themselves for the purpose of worshipping Almighty God; . . . shall immediately cause offender or offenders to be apprehended and brought before them or some other justice of the peace for the county in which such offense may be committed: . . ." (Section 1, Chapter 60, Acts of 1815) (Emphasis supplied).

Then in 1858 the first Code of this State was adopted which contained a section that is the same as Section 39-1204, Tennessee Code Annotated, except that it only covered religious assemblies. By Chapter 85 of the Acts of 1870 this section was extended to cover educational and literary meetings and by Chapter 209 of the Acts of 1879 the section was placed in its present form.

However, when the Code of 1858 was adopted, Chapter 35 of the Acts of 1801 and Chapter 60 of the Acts of 1815 were brought forward into that Code. Thus, the Code of 1858 contained both Chapter 35 of the Acts of 1801 and Chapter 60 of the Acts of 1815, along with a section which was the same as our present Section 39-1204 after the aforementioned amendments. This remained in this state

of affairs until 1921 when the Court was called upon to compare these various sections in *Dagley* v. *State*, 144 Tenn. 501. The Court in this case reached the conclusion that the section which is now Section 39-1204, of our present Code, embraced the same offense which was set out in the section containing Chapter 35 of the Acts of 1801 and Chapter 60 of the Acts of 1815.

It will be noted from the quoted part of Chapter 60 of the Acts of 1815 that it constituted an offense to disturb a religious assembly in any manner whatsoever. Therefore, in the light of the conclusion reached by the Court in the *Dagley* case, *supra*, i.e., the offense set out in Chapter 60 of the Acts of 1815 was included in the offense prescribed in what is now Section 39-1204, Tennessee Code Annotated, the only logical result to be reached here is that the phrase "or any other act" which appears in Section 39-1204, Tennessee Code Annotated, is all encompassing and it is unlawful for anyone to willfully disturb a religious assembly in any manner whatsoever.

In view of the construction which must be placed upon Section 39-1204, Tennessee Code Annotated, we are of the opinion that these Defendants violated the statute. Unquestionably the act was willful. These Defendants had been tendered seats at this meeting even though they were at first asked not to come in. However, the Defendants would not take these seats and upon command of their leader to "scatter out" they disbursed themselves throughout the audience simultaneously. The proof shows that there were seats available at the ends of the rows where they could be seated, but they, nevertheless, proceeded to step over the people already seated in an effort to get to the center of the rows. These acts are wholly inconsistent with any theory that these Defendants came with the intent of joining in the meeting. The very precise manner in which this maneuver was executed indicates

very clearly that these Defendants had planned their course of action before arriving at the meeting. This leaves us no choice but to conclude that this was a well organized scheme designed to create an incident.

This brings us to the question of whether or not their act disturbed the meeting. The record shows that when the Defendants descended upon this meeting in mass and began to step over the persons already seated it caused these people to move to let them in and some to move away, and others to leave the meeting. Reverend Scruggs, the official in charge of the meeting, stated that there was quite a commotion caused by this act with all the people moving around and further that they had to delay the service. The Court in the case of *Holt* v. *State*, 60 Tenn. 192, ruled that it was only necessary that the act attract the attention of any part or parts of the assembly to constitute a violation of the statute. This act undoubtedly attracted the attention of a great portion of this assembly if not all of it, but the Defendants' act even went further than that which is required under the rule in the *Holt* case, *supra*, because their act completely interrupted the service. We are, therefore, of the opinion that there is more than ample proof contained in this record to support the verdict of the jury.

The Defendants next argue that their constitutional rights are being violated by this conviction because this is a publicly owned facility and they could not be excluded. First, it must be noted that the Defendants were tendered seats at this meeting even though they had been denied admission at the outset. Second, this is not a suit to enjoin a discriminatory practice, nor is it a damage suit based upon the violation of civil rights, but rather a criminal action charging the Defendants with willfully disturbing a religious assembly. Whether these Defendants had a right to be at the place where this religious meeting was

being conducted is not an issue in this lawsuit. The sole issue here is whether or not these Defendants willfully disturbed the meeting that was being held there and we have hereinbefore determined this question adversely to the Defendants' contention.

Lastly, the Defendants contend that the verdict of the jury is so severe that it evinces passion, prejudice and caprice and, therefore, is void. The evidence as presented by the record clearly shows them to be guilty of violating this particular statute. We have diligently searched this record and are unable to find any mitigating circumstances which would warrant us in disturbing the verdict of the jury.

Judgment affirmed.

PREWITT, C.J.

Order of Supreme Court of Tennessee

No. 37462

EVANDER FORD, JR., *et al.*,

—v.—

STATE OF TENNESSEE.

Shelby Criminal.

Affirmed.

Came the plaintiffs in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Shelby County; and upon consideration thereof, this Court is of opinion that there is no reversible error on the record, and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered and adjudged by the Court that the State of Tennessee recover of Evander Ford, Jr.; Alfred O'Neil Gross; James Harrington Smith; Ernestine Hill; Johnnie May Rogers; Charles Edward Patterson; and Edgar Lee James; the plaintiffs in error, for the use of the County of Shelby, the sum of $200.00 each, the fine assessed against Evander Ford, Jr. et al. in the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the cost of the appeal.

It is further ordered by the Court that the plaintiffs in error be confined in the county jail or workhouse of

Shelby County, subject to the lawful rules and regulations thereof, for a term of sixty days each, and that after expiration of the aforesaid term of imprisonment, they remain in the custody of the Sheriff of Shelby County until said fine and costs are paid, secured or worked out as required by law, and this cause is remanded to the Criminal Court of Shelby County for the execution of this judgment.

The Clerk of this Court will issue duly certified copies of this judgment to the Sheriff and the Workhouse Commissioner of Shelby County to the end that this judgment may be executed.

3/7/62

Order of Supreme Court of Tennessee

KATIE JEAN ROBERTSON,

—v.—

STATE OF TENNESSEE.

Shelby Criminal.

Affirmed.

Came the plaintiff in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Shelby County; and upon consideration thereof, this Court is of opinion that there is no reversible error on the record, and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered and adjudged by the Court that the State of Tennessee recover of Katie Jean Robertson, the plaintiff in error, for the use of the County of Shelby, the sum of $175.00, the fine assessed against Katie Jean Robertson in the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the cost of the appeal.

It is further ordered by the Court that the plaintiff in error be confined in the county jail or workhouse of Shelby County, subject to the lawful rules and regulations thereof, for a term of sixty days, and that after expiration of the aforesaid term of imprisonment, she remain in the

custody of the Sheriff of Shelby County until said fine and costs are paid, secured or worked out as required by law, and this cause is remanded to the Criminal Court of Shelby County for the execution of this judgment.

The Clerk of this Court will issue duly certified copies of this judgment to the Sheriff and the Workhouse Commissioner of Shelby County to the end that this judgment may be executed.

3/7/62

Order Denying Rehearing

KATIE JEAN ROBERTSON, EVANDER FORD, JR., *et al.*,

—v.—

STATE OF TENNESSEE.

Shelby Criminal.

Petition to Rehear Denied.

This cause coming on further to be heard on a petition to rehear and reply thereto, upon consideration of all which and the Court finding no merit in the petition, it is denied at the cost of the petitioner.

5/4/62